A Canadian Charity Tribunal: A Proposal For Implementation*

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Part II

Forword

This article examines the desirability of having an independent federal body assume some of the key roles which Revenue Canada (now the Canada Customs and Revenue Agency),[b] currently plays in the charity field, as well as offering ideas about that body's structure and operations.

The article postulates the creation of an independent body having as its primary role the right to determine which organizations will be registered as charities *for* Income Tax Act *purposes only*.

Tribunal Members and Staff

One of the assumptions that both the Broadbent Report and the Joint Tables Report made about a commission is that it would be "independent". We suggest there are two distinct elements to this independence: accountability of the Tribunal within our system of government and the manner of making appointments to the Tribunal.

First, the Tribunal should *not* be part of a government department and should not have to report to a cabinet minister. The ideal situation would be that the Tribunal make an Annual Report to Parliament directly, as do, for example, The Auditor General or the Privacy Commissioner.

The relationship to Parliament and the government of the Tribunal may be developed and refined if some of the recommendations of the Joint Tables Report's "capacity" proposals are adopted. If a minister or group of ministers

*Editor's Note: So that readers may have the full text and Appendices of this important contribution to the current debate surrounding the restructuring of the federal laws and regulations governing the Canadian charitable sector, this article will be published in two parts. Part I appeared in Volume 15, Number 4.

is appointed to have responsibility for the voluntary sector at the federal level, if a secretariat is created, and if a Parliamentary Committee dealing with the voluntary sector is created[55] then it will be necessary to determine the interplay between the Tribunal and one or more of these bodies. But it seems to us that if the Tribunal is truly to be independent, then it must not be seen to be an arm of any of these bodies or responsible to them. On the other hand if, for example, the suggestion of the creation of a standing Parliamentary Committee is adopted, it would make sense that the Tribunal's Annual Report to Parliament be submitted to the Committee for review and comment.

A regular feature of the Committee's calendar might be the calling of key people from the Tribunal to "discuss" issues of importance to the sector.

If there is a minister appointed for the voluntary sector, either formal or informal procedures could be adopted so that there can be an exchange of views. The same is true if a secretariat is created to deal with voluntary sector concerns, even if there is no single minister in charge. In England, for example, the Charity Commission has a relationship with the Ministry of Attorney General and through that office will let government know when troubling or contentious issues seem to be arising.[56] In so doing, the Tribunal would not seek to justify its actions or seek instructions but rather give the government an early indication of problems that may be developing. This approach also allows the Tribunal and other government departments to co-ordinate their approach to issues of mutual concern.[57]

Appointments to the Tribunal

There is another aspect of independence which has to be considered: how Tribunal members are appointed. If we assume that they will be appointed by the government,[58] how can an individual appointed member be seen to be independent? It is unreasonable to assume that the government would pay the full cost of the Tribunal, have it established as a state functionary and allow the key appointments to be made by others. In any event, as the Broadbent Report[59] notes, the body should equally be independent of the sector.

The most common method of making appointments to federal boards, commissions and similar bodies has two basic criteria. The first is to assume that there must be at least geographic, linguistic, gender and "ethnic" representation. This normally results in a fairly large board. Some interest in, or knowledge of, the subject is often a consideration though frequently there is no requirement for specialized knowledge. The second criterion is kinship with the party in power. This is understandable in most cases and probably there isn't much harm done.

In our view, given that the purpose of the Tribunal is to be a participant in a significant administrative and statutory reform of the federal law of charities, we do not believe that connections or broadly fashioned representation should be governing criteria. What is needed is a group of people who have some level

of expertise (either from the legal, sectoral or government perspective) and who have an understanding of what the role of the Tribunal will be over both the short and long term.

If there was no need for geographic[60] and other types of representation, the members of the Tribunal could be few in number. (England and Wales operates with just five commissioners, two of whom are "part time")[61]. We also anticipate that one of the problems which will be faced is that the pool from which selections of qualified people could be made is small, especially when the potential for conflicts of interest is considered.

As a first step, we'd suggest that the appointment process for members of the Tribunal be initiated by application. We believe that the required positions should be advertised widely (not just a formal announcement in *The Canada Gazette*), together with the criteria. The selection of a number of qualified candidates to form the basis of a list of recommended appointees should be done by a neutral group, perhaps a body such as the Public Service Commission of Canada which has extensive experience in recruitment and placement and is widely recognized for its impartiality.

The selection board (which could include some sitting deputy ministers and senior people from the sector) would base their choices on the usual criteria for job appointments, namely the qualities necessary to do the job. Recommendations would then go to Cabinet which would consider them and appoint through an Order-In-Council. This process should also make removal of a Commissioner difficult, so the appointment would be for a term of years or "during good behaviour" but not "at pleasure".

We believe that this (or a substantially similar) procedure would go a long way towards ensuring that those appointed are independent of government, despite the fact that the funding of the Tribunal and its members' salaries would be by government.

The appointment of the members of the Tribunal should also take into account their role. If the Tribunal is created and there were no change in the *Income Tax Act* relating to the "definition" of charities, the members of the Tribunal would have to have a high level of legal expertise, as would at least some of their support staff. If, on the other hand, there were substantive changes to the federal tax law relating to definition, one could more easily have Tribunal members whose backgrounds were less law oriented and who could bring experience from various parts of the sector.

In our view the drafting of criteria and job descriptions becomes crucial to the selection process, therefore one way to retain independence and to ensure competence, aside and apart from the process, is to create statutory guidelines or limits for the filling of the positions.

In Appendix B, we offer two existing statutory models which are designed to focus the characteristics required of appointees to ensure competence levels. Section 3 of *The Standards Council of Canada Act* is designed to ensure federal, provincial and sectoral representation on the Board. Subsection 6(2) uses general language to try to ensure a level of expertise and breadth of representation on the Board.

While the Joint Tables seemed disposed to adopt the Standards Council's structure as a model, we favour the structure of the Cultural Property Review Board. As noted elsewhere here, this board actually makes decisions about the quality of works of art and other objects and their value which are binding on Revenue Canada and which have significant tax ramifications.[62] Like the proposed Tribunal, the Export Review Board makes hundreds of decisions every year which have direct consequences for government tax revenue. That being the case, we think it is instructive to look at the statutory requirements for Review Board membership.

Statutory Considerations in the Appointment of Tribunal Members

Under subsection 18(2) of the *Cultural Property Export and Import Act*, the Review Board is limited to 10 people, though the appointments are on the recommendation of the Minister of Canadian Heritage. Up to four of the people must have backgrounds with experience in galleries or museums while up to another four come from among dealers or collectors of art and antiques.

While the existing statutory language could be improved, the model is one which could certainly be used for a Tribunal. We could have a smaller board than, for example, the Standards Council, that could have guidelines similar to those of the *Charity Act* (referred to earlier) and the *Cultural Property Act*. There could be a requirement for legal/accounting training, a history of employment in the sector and other criteria to be determined when we have a better idea of the overall role the Tribunal is to play. But the point we want to emphasize is that it is possible to draft legislation which "guarantees" representation from the various "players" and also tries to ensure a threshold level of expertise and experience.

In summary, we believe that the Board of the Tribunal (for lack of better terminology) should be comparatively small (say five to 11) and chosen for a combination (either in any individual or as a group) of technical and sectoral experience. We believe that the process should include an application procedure, an independent nonpolitical selection process, and a set of statutory guidelines.

Tribunal Staff

Turning to the issue of staff, there is a potential quandary which those people filling the positions will discover. The obvious source of new staff might be

from amongst those currently employed in the Charities Division. The rationale would be that these people already have some training and expertise in the field.

On the other hand, the concern we have expressed earlier is that the culture of the taxing authority is inappropriate for an influence on the decisions made about charitable determination. This fact militates against a wholesale transfer of personnel from that authority. The question is simply whether the vast majority of the existing staff would maintain a "tax authority" perspective.

In a similar manner to the selection of the members of the Tribunal, we suggest an open employment process with all the positions advertised widely and publicly. Current employees of the Charities Division would be specifically encouraged to apply if they had an interest in continuing to work in the field, but that there would be no preference given *per se* because of their job status. Obviously, however, if they can show a level of expertise in the field which stems from having been in the Charities Division, this would be an asset. We would, however, recommend against any procedure which simply transferred all the employees from the Charities Division to the new organization without any selection procedure.

We would see the employees of the new organization being "civil servants", subject to the normal rules of the Public Service Commission, presumably unionized and with the ability to move fairly easily to other departments within the public service.[63] On the other hand, all efforts should be made to recruit people who see work within the charity milieu as a career goal and not simply as a step up the employment ladder within the civil service. Once the Tribunal is well established, there should be an effort to promote from within while at the same time attempting to attract fresh blood with new perspectives on the issues being considered.

As a brief aside, we note that this approach to the creation of the Tribunal and to its staffing requirements would contribute to building the capacity and strengthening the relationship of the voluntary sector with government, a matter the Joint Tables addressed. The movement of personnel between public and private sector is well known and appreciated for the perspectives that it brings to institutions in both spheres. Developing stable career opportunities in an independent working environment within the overall government apparatus would, over time, we believe, significantly contribute to the same exchange of personnel with the voluntary sector.

While we believe that a body like the Public Service Commission should be in charge of staffing (after taking into account the perceived needs as set out by the Board of the Tribunal) those Board members should have an active role in selecting senior staff. If the Board members are of the quality and experience which we believe the processes we have outlined will produce, then they will be uniquely qualified to assess the applicants for senior positions.

If, as we believe, it is not desirable simply to transfer existing Charity Division staff to the new organization, there will have to be a period of overlap between the Charity Division and the Tribunal. The Tribunal will need some time to establish itself, both in terms of the mechanical issues ranging from getting physical space, equipment and staff to the more fundamental matters of developing policy. It seems to us that for a period of six months to a year, there should be an overlap. While the Tribunal is getting itself established, the Charities Division will continue to function.

Communications and Confidentiality

Problems created by the restrictions under the *Income Tax Act*[64] designed (quite properly in our view) to limit access to taxpayer information, have been noted. Though the provisions are riddled with exceptions to the rule, including special rules relating to charities,[65] the fact is that the system is not geared to be "information friendly".

Reflecting the different nature of CCRA as administrator, in contrast to a Tribunal in a quasi-judicial judicial role, CCRA, for example, never explains why it registers a particular organization (or even admits that it does so), though of course it does publish general information. The English Commission actually has published five "volumes" (slender ones, to be sure) explaining what it has done in certain types of cases and why. It is currently involved in a very public process which goes under the name of "examining The Register" but which is nothing less than a public consultation on a rewriting (albeit administratively) of the England and Wales definition of charities.

As suggested, one of the major advantages inherent in transferring federal administration and determination about charities from CCRA to a new body, lies in the opportunity for the public to be made better aware of the process of registration and deregistration, the rules which are followed and the guidelines used, as well as establishing public precedents in cases where similar organizations have been recognized as charitable.

In effect, the new organization would be in a position to create its own rules on access and confidentiality without statutory constraints. It is worth noting that while this is the case in England, there are unwritten internal guidelines, usually based on common sense. A series of questions we posed in interviews[66] about what would or would not be disclosed to members of the public in answers to queries elicited responses which amounted to "it depends", and to a great extent the issue was whether, in the view of the Commission, the questioner had a legitimate interest in getting an answer. While this might not appeal to the new Canadian organization, the fact of the matter is that there are few legal constraints[67] in England in regard to this issue and common sense seems to be the guiding principle.

But there is a big difference between issues of confidentiality about specific files which are still being considered (either for registration or deregistration) and secretiveness about what has already been decided, either in terms of a particular file or in terms of policy. It seems illogical that the Canadian public can get the public information return of any particular charity, the name of which it knows, but will get no help in trying to identify charities within a group.

We also do not understand why the names of organizations which are already registered cannot be divulged and their applications used as precedents. If one looks at the new-found ability of CCRA to divulge information under the provisions of subsection 241(3.2), the problem is clear. If you *know* the name of a particular registered charity which is working in a specific field, then information may be available.[68] But if you ask first about the name of a charity in the field of interest, it can't be given under current legislative constraints.

At the very least, we would expect that the new organization should consider the following:

- Expanding the internet search engine to allow searches of registered organizations by key words linked to filed purposes and activities.
- Making all documents in a file available to public search, excluding only those documents which relate to issues which the Tribunal is considering.
- Publishing an annual report on the Tribunal's activities.
- Publishing a regular report of decisions of the Tribunal with an emphasis on why such decisions were taken, both in cases of registration and refusals to register.[69]
- Issuing press releases when issues relating to a charity surface in the media providing that the issue in question relates to the Tribunal's jurisdiction.
- Inviting public discussion on issues of concern to the Tribunal including the appropriateness of certain registrations.[70]
- Publishing of precedents.
- Issuing of user-friendly guidelines on registration, what types of organization are eligible and the legal obligations of registered organizations.

At this juncture it is impossible to determine the exact level of public disclosure which might be appropriate except to say that it is necessary that the level (and speed) of disclosure be improved. It will be for the members of the Tribunal to decide, as a high priority but presumably unencumbered by statute (except of course, perhaps for an mandatory annual report), what level of disclosure is appropriate and how it will be effected.

The most important point is that the bias must be in favour of greater disclosure about the workings of the Tribunal and its processes of decision-making, as well as about organizations which have been registered. Here we echo and endorse the theme of the Joint Tables Report that the institution involved in the determination and oversight of charities at the federal level needs to be independent and transparent in its operations. Difficulties will arise in the case of refusals to register and deregister charities. There will be a need to balance the public interest in knowing what is happening with the right of the organization to some level of confidentiality. An independent organization with known procedures and standards will contribute greatly to the acceptance of those decisions as having been fairly made.

Intra-Governmental Relations

It goes without saying that the Tribunal will have to be in regular contact with other government agencies and departments, in particular CCRA and Finance, but also with some of the central agencies and perhaps other departments which have "client" interest. For the most part, the contact procedures need not be formalized in statute and presumably will be developed mutually in discussions between the Tribunal and the departments.

We would assume that there are well established procedures to deal with everything from budgeting to staffing, pensions, and accommodation, which would be implemented once the Tribunal is established and is in the process of becoming operational.

If the recommendation is accepted that CCRA retain the function of auditing registered charities, then it will be necessary that there be an amendment to subsection 241(4) of the *Income Tax Act.* which allows Revenue Canada to provide a whole range of entities (other departments, provincial governments and so forth) with tax information without contravening the confidentiality provisions of the *Act.*[71]

We would also anticipate that there would be very regular, weekly if not more frequent, contact between the Audit Division of CCRA and the Tribunal and we would expect that audits would be done both according to CCRA's own norms and also at the request of the Tribunal.

But the Tribunal will also want to be able to communicate with CCRA and Finance (and perhaps other departments) about policies which are being developed and about specific applications which are being considered. In a communication to us, Kenneth Dibble, the Chief Legal Officer of the English Charities Commission (and later discussions in a personal interview with Mr. Dibble and with a representative of Inland Revenue, the British equivalent of CCRA) outlined the approach used by the Commission.

We believe the situation can be fairly summarized as follows:

- The Commission and Inland Revenue agreed on guidelines which would determine the types of specific cases and situations which would merit the Commission bringing them to the attention of Inland Revenue.[72] In any given year, the number of cases would probably be less than 30.
- Inland Revenue gives its view on whether these organizations should be registered using common law tests as they or their legal counsel understand them. They do not base their support or opposition on such matters as the potential cost to the Treasury.[73]
- Both parties agreed that the final decision was always that of the Commission. But Inland Revenue can appeal[74] a decision to the courts if it feels very strongly.[75] We are proposing that CCRA have a similar right to launch an appeal.
- When the issues relate, not to files but to broader policy issues (as is happening now with the Review of the Register exercise), the main contact is with another part of Inland Revenue.[76]

In our view, similar arrangements, the creation of mutually agreed guidelines and the ability to confer and consult, will have to be put in place, not only with CCRA but also with Finance, at least insofar as policy issues are concerned. The Tribunal will also want to develop a process whereby it can easily consult with other government departments where those departments' expertise and interests may be of use in helping the Tribunal to set policy and to make determinations about specific files.

The relationship with Finance will be most important for two reasons. First, the decisions of the Tribunal may have an impact on revenues in that each registration may mean that there will be incrementally more tax-receipted donations made. There may also be policy decisions which will have significant impact.

Second, the record suggests that Finance has been wary when it comes to amending tax legislation which deals with charities (as opposed to charitable donations). We anticipate that the Tribunal will develop considered opinions as to the changes which, *in its view*, are required. We would anticipate that, as a matter of course, a procedure would be put in place to allow an exchange each year, or more often, as required.

We would suggest that set procedures and guidelines be established to allow regular contact with Finance as with the CCRA. We would also suggest (though it is far outside our purview) that consideration might be given to having one or more officers at Finance designated as contacts with the Tribunal and that procedures be put in place there to ensure that the Tribunal's concerns are given serious consideration.

The Nature of the Charity Tribunal – Its Legal Basis and Role

We are concerned with identifying the best means by which the decision about what constitutes a charity is made, we are also concerned about the lawful authority for any particular act. This leads directly to the question of review or appeals.

General Considerations

We believe that the requirements for independence, specialized knowledge and the related functions of adjudication, policy formulations and, potentially, rulemaking, taken together suggest the need for a specialized administrative tribunal authorized by specific legislation. We do not believe that, in the first instance, the courts are the appropriate forum for the efficient, effective determination of what constitutes a charity for the purposes of the *Income Tax Act*. Given the numbers of cases involved, a court is ill-suited to the task of high-volume adjudication. The various elements of what constitutes legal charity require that specialized expertise be brought to bear.

The traditional adversarial process inherent in our courts does not lend itself to the consideration of a broad range of factors necessary to give life to the often stated principle that the notion of charity is an ever-evolving concept. Finally court procedures are not flexible enough to respond to the adjudicative requirements of the determination of charity under the *Income Tax Act*.

The Charity Tribunal should be conceived as having two elements: an administrative function performed by a registration division headed by a Registrar and an adjudication function, carried out by the Board of the Tribunal. Many, if not most, applications for charitable registration under the *Income Tax Act* would be determined by reference to the existing body of law. The Registrar would administer that law and would make administrative decisions as to whether any particular applicant is, and will operate as, a charity. In a limited number of cases the Registrar will have doubts. Those applications would be rejected, with the Registrar having the ability (on notice to the applicant) to seek a determination of the Board of the Tribunal, sitting in its adjudicative capacity. As well, notice of that consideration would be given to presumably interested parties, such as the CCRA, other government departments or outsiders whom the Board thinks might usefully be heard.

At the hearing, the Registrar would appear, not in an adversarial capacity but in the nature of an *amicus curiae*. Its function would be to provide an information brief to the Board of the Tribunal setting out the state of the law giving rise to the Registrar's rejection. On the other hand, if they choose to do so, CCRA or other parties could appear in a more adversarial role laying out their reasons why the current law should be applied so as to deny status. The applicant would take its own position. All submissions could be in writing, or at the option of the Tribunal, a hearing could be convened.

A decision by the Charity Tribunal could be subject to an appeal to the courts by either the rejected applicant or by CCRA. We suggest that in the first instance the Tax Court of Canada be used for a *de novo* hearing, with a further statutory appeal, having regard to the broad underlying legal principles for consideration, to the Federal Court of Canada.

We believe that this formulation is consistent with what is required to advance the identified requirements of independence and the specialized knowledge required for adjudication, policy formulation, and potential rule-making. As has been noted, these bodies can be empowered to exercise one, some, or all of the following functions:

(a) Adjudication – the act of decision-making.

(b) Policy making – the making of policy choices which may be reflected in adjudicative decisions, subordinate legislation, or policy statements issued to assist in the administration of a scheme.

(c) Rule making – the making of subordinate legislation to reflect policy choices necessary to the effective administration of the scheme.

(d) Enforcement – action taken to compel compliance with adjudicative or policy decisions.

(e) Research – the identification and study of problems and issues associated with a particular aspect of government administration.

(f) Investigation – an inquiry into the existence of certain facts associated with the resolution of a dispute, a complaint or the satisfaction of a claim.

(g) Prosecution – the institution of proceedings against those thought to contravene the legal rules governing the operation of a particular governmental scheme.

(h) Advising – the giving of information and compliance advice.

We believe that the tribunal, in its initial formulation, should only address the matters contemplated by (a), (b) and (h). But in considering the nature of the organization and formulating its constituent elements, sub-delegated rule-making authority should be considered for eventual inclusion in its mandate, in light of the anticipated necessity for policy formulation based on specialized expertise.

As the Charity Tribunal is clearly an administrative tribunal acting as decision maker under delegated authority, its decisions will be subject to the developing body of administrative law controls. The need both to ensure that the Tribunal's administrative actions are not beyond the scope of its authority and to acknowledge and enhance the specialized nature of determining what constitutes a charity for the purposes of the *Income Tax Act*, means that the task of devising

the appropriate legal controls on the Charity Tribunal is a somewhat complex challenge and needs to be carefully considered.

The Registrar

The Registrar performs the function of receiving applications and considering them in accordance with guidelines established by the Board of the Tribunal. At this stage we also see, in keeping with our earlier observations about relations with other government departments, the need to oblige the Registrar to circulate applications which raise contentious issues according to established protocols but which are likely to be approved, to other interested departments. These protocols could be fashioned in regulation.

Once an application was complete in a manner prescribed by Regulations, the Registrar would have 15 working days within which to accept or reject the application, in accordance with the Board of the Tribunal's administrative guidelines. Any application not considered within 15 business days would be deemed approved.

All applications would be reviewed by a panel of the Board of the Tribunal, subject to the right of the Chair or Vice-Chair of the Board to constitute a larger hearing panel. For applications which the Registrar denies, if the Tribunal Board upholds the denial, notice would be given to the applicant inviting further representations. The applicant could request an appearance before the Board of the Tribunal or choose to make submissions entirely in writing.

All considerations by the Registrar would require a summary of the reasons for acceptance or rejection having regard to the administrative guidelines. The Registrar would appear, at the time of consideration by the Board of the Tribunal, either by way of its summary of reasons or, at its option, by a representative of the Registrar's staff.

The Board of the Tribunal

Given the administrative relationship we envisage between the Registrar and what we are calling the Board of the Tribunal, we believe that the following formulation of jurisdiction constitutes the appropriate basis for the decision-making function of the Board. This statutory basis would be found in amendments to the *Income Tax Act*. For example:

> There is constituted the Charity Tribunal of Canada. The Tribunal has exclusive jurisdiction to determine all questions of fact and law relating to charity, as that term is used in the *Income Tax Act*, subject to consideration by the Tax Court of Canada and appeals to the Federal Court of Canada as provided in section [] .

In the administration of this sort of regulatory scheme, we have suggested that an emphasis be placed on special expertise and independent decision-making. This will require expertise in matters other than law. As an expert tribunal,

insulated from political pressures, a Tribunal empowered with this form of jurisdiction would, in our view, advance the requirements we have outlined. And, given that the Tribunal would operate without the full arsenal of the adversarial process, it would be able to inform itself of a range of relevant factors, admitted into evidence as it determines, so as to advance the requirement of registering charities.

We suggest that the Board of the Tribunal should have a Chair and two Vice-Chairs. These would be full-time appointments. The remaining members of the Board of the Tribunal would be part-time appointments. In keeping with our earlier observations that offices of the Tribunal might exist in a number of locations in the country, we suggest that a pool of qualified part-time appointees be constituted in the various regions. Every panel of the Tribunal would have one of the Chair or Vice-Chair and two other members sitting. This formulation would also allow the chair to address questions of conflict of interest. The Chair or a Vice-Chair would have the prerogative of constituting a larger hearing panel should that be appropriate to the matter under consideration.

Further Consideration and Appeals

One of the most important requirements for establishing an independent decision-making Tribunal is to allow it to develop a body of rules which are known and clear. But acting as an instrument of delegated authority, the Tribunal must be subject to appropriate review of its decisions and jurisdiction. In recent years the courts have developed a range of review criteria so we suggest that a review function be established, having regard to the need for Superior Court review weighed against costs to the parties and the time involved.

Thus, we suggest that where the Board of the Tribunal denies an application at the hearing stage, notice with reasons be sent to the applicant within 15 business days of the hearing. The notice would invite the applicant to elect either the informal procedure under the Tax Court Rules or the formal procedure. The jurisdiction of the Tax Court would be a *de novo* consideration. The parties to the hearing would be the Attorney General of Canada and the applicant. The Tribunal could be represented at a hearing through a similar fashion to Labour Board practice in some jurisdictions, with a representative of the Tribunal appearing in an informational role only and not as a party.

If the Tax Court upheld the denial, the applicant would have a further appeal to the Federal Court of Canada, at its own expense. The review by the Federal Court would be an appellate one, on the record and without the opportunity to call evidence except in accordance with the rules of the Federal Court. If the Tax Court approved the application, notice would be given to CCRA and to any other government department having a potential interest in the matter as well as to the Tribunal. If any of those interested parties chose to advance an appeal, the Attorney General acting for Canada would give notice to the

applicant of an intention to appeal. In that case, costs of the appeal would be borne by Canada, subject to a regulation as to the schedule of fees and disbursements, in the normal way.

We also think that serious thought should be given to establishing a list of approved counsel who would be willing to act for needy litigants where counsel is unavailable and the applicant is without funds. It might be that this authority should be given to the Tribunal to appoint from the list where a needy application matter raises issues of concern calling for counsel familiar with charities issues. This charity law list could be established on a regional basis on application by interested lawyers with fees and costs set in a similar fashion to the schedule established for Federal Court appeals.

A word is in order about onus in the appeal process. Appeals under the *Income Tax Act* automatically put the onus on the taxpayer/appellant in any litigation. We have taken the position that the appropriate approach in considering charity cases under the new regime is that there should be a presumption that the activities in question are charitable unless it can be demonstrated that they are not. This being the case, we take the position that, on appeal, the onus is on the Tribunal, CCRA or any party opposing registration (or supporting deregistration) to meet the necessary burden of proof – in effect shifting the onus from where it stands today.

A final word about deregistration. Charities may be deregistered for many reasons. In situations where the deregistration is at the request of the charity, the deregistration should be carried on at the registration level. Where the deregistration is for "mechanical" reasons such as the failure to file returns, the deregistration notice should be issued by the registration branch with some time allowed for the organization to launch an appeal to the Tribunal itself.

On the other hand, where the deregistration is based on an alleged breach of the *Income Tax Act* (other than a "mechanical" failure) or on the basis that the charity no longer carries on charitable activities, deregistration should come only after the charity has had an opportunity to make a formal submission (similar in nature to what would occur after a refusal to register) to the Board of the Tribunal, with a subsequent appeal into the court system if the Board upheld the deregistration.

Conclusion

We believe that the time has come in the evolution of the administrative and legal framework of charities under the *Income Tax Act* for an independent decision-making and supervisory body to be constituted. The existing arrangement which sees the Charities Division of CCRA administer a body of rules which is modified only slowly and with extreme expense, is inadequate. The Division is put in the conflicting position of being the legislated administrator but also an adjudicator without jurisdiction. To that situation has been added

a method of appealing decisions which is unduly complex, protracted and expensive. All of this occurs within the context of a taxing authority.

We believe that the creation of an independent quasi-judicial administrative Tribunal with clear, legislated jurisdiction, independent appointments capable of hearings throughout the country, and a process to both administratively determine qualification and adjudicate the status of difficult cases, will address the significant current problems associated with determining charitable status under the *Income Tax Act*. Specifying clear procedural deadlines, including a mechanism for deemed approvals and review for a Tribunal, would establish the administrative framework which could properly and expeditiously deal with the cases put to it.

Moreover, establishing a first-level review process to the Tax Court with the applicant's option to use the informal rules would provide an appropriate oversight of the Tribunal's work without significant impediment in time or cost to those seeking status. When this arrangement is coupled with adequate involvement of the tax authority, the tax policy authority and other arms of government, a facility would be established which could both manage the decisions about status under the *Income Tax Act* and develop an enhanced expertise about the policy requirements necessary to properly regulate charities under the *Income Tax Act* on a continuing basis.

This article has been written to assist those contemplating whether there should be a charity commission for Canada. Our view is that the question is not whether, but how. Moreover, we have found that, as so often in this kind of policy discussion, a serious impediment to an adequate consideration of the unknown results from a real concern about the interaction of administrative and technical detail. By fashioning a broad picture of what could be a Charity Tribunal of Canada and setting out an adequate measure of detail, we hope we have offered a picture of the "how" that will move those still concerned with whether to take the next step. We fear that without doing so, the promise inherent in the view that charity is an evolving concept cannot be realized.

FOOTNOTES

a. Author's Note: Funding for this publication was provided by the Non-Profit Sector Research Initiative, established by the Kahanoff Foundation to promote research and scholarship on nonprofit sector issues and to broaden the formal body of knowledge on the nonprofit sector. The views and interpretations expressed in this paper are those of the author and do not represent any position or policy of the Kahanoff Foundation or the Non-Profit Sector Research Initiative.

The primary writer was Arthur Drache, though Laird Hunter did a first draft of some sections. There has been an intellectual collaboration between Drache and Hunter over a period of many years and many of the ideas put forward in this paper are a result of that collaboration. In addition, Laird Hunter has read several of the drafts of the paper and made extensive editorial contributions, not the least of which was the use of the term "Tribunal" as a substitute for the more commonly used "Commission".

b. In this paper, we occasionally use the term "Revenue Canada", "the Department" and similar terms, notwithstanding the fact that we are well aware that as of November 1, 1999, Revenue Canada became the Canada Customs and Revenue Agency (CCRA). Obviously, nobody really knows what changes, if any, may occur as a result of the new status of the tax authority in Canada but there has never been a hint of a suggestion that the Charities Division will operate any differently under the new corporate structure.

55. Each of these ideas is an idea or option referred to in the Joint Tables Report pp. 25–27.

56. The process was explained to Arthur Drache in a private conversation with Kenneth Dibble, the head lawyer of the staff of the Charity Commission.

57. There is a different and more direct relationship with Inland Revenue which will be discussed later in this article.

58. Presumably, by Order-In-Council.

59. At page 63.

60. We believe that some thought should be given to having the Tribunal dispersed in several geographic areas. Having several offices may create some problems of co-ordination and consistency but it would remove the current feeling that the decision makers are both removed and remote from the applicants.

61. See Schedule 1 of *The Charity Act, 1993*. There need be only three commissioners, though others may be appointed. At least two (of the three) must be lawyers. In fact, at the present time they have a career civil servant, a lawyer, a representative from the charity sector, an accountant and a law professor. They are deemed to be civil servants and are paid by the Crown.

62. For example, property certified by the Board may be donated or sold to organizations also designated as meeting certain qualitative criteria by the Board, and the gift or sale will not attract any capital gains taxes.

63. It might be useful to look at the transition from a government department to an "agency" when Revenue Canada became the Canada Customs and Revenue Agency. While it is true that all employees of Revenue Canada on October 31 woke up and found themselves employees of the CCRA on November 1, 1999, one of the rationales for creating the new organizations was to give more "flexibility" in personnel and compensation issues than exists in the bulk of the public service. By the time the government is able to move on the creation of a Tribunal, we may have some better guidance relating to possible human resource options.

64. See section 241 of the *Act*.

65. Subsection 241 (3.2) states:

    (3.2) Registered Charities – An official may provide to any person the following taxpayer information relating to a charity that at any time was a registered charity:

    (a) a copy of the charity's governing documents, including its statement of purpose;

    (b) any information provided in prescribed form to the Minister by the charity on applying for registration under this Act;

    (c) the names of the persons who at any time were the charity's directors and the periods during which they were its directors;

    (d) a copy of the notification of the charity's registration, including any conditions and warnings; and

(e) if the registration of the charity has been revoked, a copy of any letter sent by or on behalf of the Minister to the charity relating to the grounds for the revocation.

66. Separate interviews with Michael Carpenter, the "legal" Commissioner and with Kenneth Dibble, the most senior law officer.

67. Which do apply, in England as in Canada, where questions are posed to Inland Revenue.

68. The actual workings of the provisions are something else. Our experience in the first year of operations is that it was exceedingly difficult to actually get information and time was certainly not of the essence. At other times, we were told that while CCRA must provide information in "prescribed form" under paragraph (b), the organization's statement of activities, a crucial document in any application, was not on a prescribed form and thus not available. This interpretation is typical of the mind-set of many of the bureaucrats at CCRA, an unhelpful attitude which must be changed.

69. In December, 1999, the English Charity Commission made the decision not to recognize the Church of Scientology as a charity in England and Wales. Both a summary of the reasons and the full text, 49 pages long, were posted on the Commission's internet site. This, we believe, is an example of the openness which the Tribunal should emulate.

70. Right now, the Charities Division receives many such submissions about registration or deregistration but in most cases will not even acknowledge that files exist. The extent to which the submissions have an impact is not known. Opening up or formalizing the process may or may not be desirable, but it is an issue that the Tribunal should grapple with.

71. There is an equivalent and very broad provision giving similar effect in section 10 of *The Charity Act, 1993*.

72. These cases would likely go to the Financial Intermediaries and Claims Office (FICO).

73. The interviewer expressed some polite skepticism but was assured by both those interviewed (speaking at different times and places and not in each other's company), that this was indeed the case.

74. Dibble stressed that, in truth, there is no "appeal" but a *trial de novo* to which the Commission is not a party!

75. See *I.R.C.* v. *McMullen*, [1981] AC 1, for example, which holds that the support of sporting facilities in schools and universities is charitable under the head of "education" even though support of sports generally is not considered to be charitable.

76. The Capital and Savings Division. The two branches of Inland Revenue also effect liaison on subjects, be they files or policy, which they think might be of mutual interest.

Appendix A
Institutional Change

Given the objectives of the regulatory framework for the voluntary sector and the need to make changes therein, the Regulatory Table has developed three models for the institutional or regulatory oversight arrangements:

Model A: an enhanced Revenue Canada (CCRA) Charities Division.

Model B: an agency, somewhat similar to that proposed by the Broadbent Panel on Accountability and Governance in the Voluntary Sector.

Model C: a commission, similar to the Charity Commission for England and Wales.

Below is an outline, in broad terms, of the models' core mandates. The current vision is that each would be a federal body. There is potential, however, to design structures in a way that would allow opting-in or some other type of co-ordination with provincial authorities.

Model A: Enhanced Revenue Canada (CCRA) Charities Division

The Revenue Canada (CCRA) Charities Division would retain its current authority for the administration of the *Income Tax Act* with respect to charities. The Division's mandate, however, would be expanded to include responsibility for facilitating public access to information about charities, and responsibility to assist charities with registration and compliance with the law.

The Division would be assisted by a committee, composed of individuals knowledgeable about charities and the law, that would advise on all aspects of the Division's expanded mandate. In addition, charities would be able to request an administrative review within Revenue Canada (CCRA) of Charities Division decisions.

Model B: Agency

The agency's functions would complement those of the Charities Division. While the Divison would still make the decisions, the agency would, at greater arm's length than the advisory committee of Model A, make recommendations on difficult cases, issue policy advice, and help organizations to comply with the regulator.

As well, the agency would nurture and support charities and other voluntary organizations, and provide information to the public. This complements the option, outlined by the Table on Building a New Relationship, for an agency to nurture the relationship between the federal government and the voluntary sector.

Model C: Commission

A quasi-judicial commission would undertake most of the functions currently carried out by the Charities Division. It would provide authoritative advice to the voluntary sector and expert adjudication of appeals on decisions by its Registrar. At the same time, such a commission would have a support function not unlike Model B's agency.

The Models' Shared Assumptions

The Table assumes that the following conditions would apply to all models:

- The appeals process would be reformed. All three models contemplate the need for administrative, quasi-judicial and judicial review, the potential for greater access to

appeals, and a richer accumulation of expertise by adjudicators. This would guide both the sector and those who administer this complex area of law.

- Confidentiality restrictions around the registration process would be eased.
- Any body mandated to oversee the sector should have sufficient resources and expertise to develop policy, educate and communicate.
- There would be greater effort to foster knowledge of the rules and ensure compliance with them, including institution of intermediate penalties.

Self-Regulation in the Models

As a partial response to the need for change, self-regulation can be seen as having great merit. This is provided that no duplication of reporting requirements would be created if self-regulation became institutionalized.

The potential and effect of increased self-regulation are similar in each model.

Assessment of the Models

Each of the three models was assessed with respect to the identified need for change and with respect to a number of criteria:

- the ability to improve the availability of public information and knowledge about the sector;
- the potential for serving the non-charities part of the sector;
- the ability to accommodate provincial involvement;
- the compatibility of a support or nurturing function with other functions of the organization;
- the effect on regulatory burden;
- the degree of independence each would have from the government and the sector;
- the ability to enhance the confidence and trust of the sector and public; and
- government control of costs.

Chart I is a comparison of the models according to the preceding criteria.

Chart I – Assessment of the Models

Goals/criteria	*A: an Enhanced CD*	*B: an Agency*	*C: a Commission*
Improved public information and knowledge about the sector.	Website and other measures could make for improvement over the status quo.	Could be more vigorous program than under A.	Same as B.
Potential for serving the noncharitable voluntary sector.	Status quo.	Yes, on a voluntary basis. The Agency would be a more acceptable interface than CCRA's CD.	Yes, in that there are statutory obligations, and otherwise on a voluntary basis. The Commission would be a more acceptable interface than CCRA.

Ability to accommodate provincial involvement, including, potentially, co-ordinated regulation.	Canada Customs and Revenue Agency (CCRA) has a Board with provincial representatives.	Broader potential for provincial involvement on a partnership basis.	Structures could be developed to accommodate provincial input more focussed on the charitable/voluntary sector.
Compatibility with a support or nurturing function.	In the final analysis, CCRA will remain the "cop."	An Agency would provide significant scope for this.	Regulatory and support functions can live side by side but the nurturing function is likely to be somewhat more restrained than under B.
Regulatory burden: – compliance cost – efficiency/ duplication	No change from the status quo (but some suggestions on short-form reporting).	Burden could be lightened as a result of preventive regulation functions and assistance to individual groups on applications or with returns.	Functioning of the Commission would need to be carefully designed to ensure there is no increase in regulatory burden.
Degree of independence from government and the sector – including clarity of roles.	Same as now, except for profile of the advisory committee.	The Agency would be a friend of the sector. It would also have extensive working relationships with CCRA.	A Commission would have greater independence from both government and the sector than would exist with either A or B.
Enhancing sector confidence and trust in the regulator, e.g.: – working relationship – respect for confidentiality – objectivity of the appeals.	Better working relationship than currently exists.	Better working relationship than under A – to the extent that the Agency succeeds in its role of representing the interests of the sector.	May be better than both A and B (good working relationship, objective and confidential advice, independent appeal machinery).
Enhancing the public's confidence and trust.	Better than at present.	Role may be difficult for the general public to understand.	Same as A.
Government control of costs.	Government remains in control.	Government retains control but the Agency, through its recommendations on (de)registration and through its policy advice, would still be in a position to push at the edges.	Within the four corners of common law and statutory definitions, the Commission might see room for both narrower and wider interpretations, possibly resulting in a net gradual expansion of eligibility.

General Comments Related to Chart I

- Assumptions on reform of the appeal process, the easing of confidentiality restrictions and greater compliance support already implied that all models would see improved transparency around registration, more effort to ensure compliance (including institution of intermediate sanctions), and a more accessible appeal process. Hearings on controversial cases could be instituted under any model.
- Compared with the current situation, all of the models would foster, to some extent, both the enabling and accountability objectives of the regulatory framework.
- On several other criteria (improved public information and knowledge, enhanced confidence and trust by the sector), the differences between models are incremental, with model C perhaps best situated to ensure public confidence. All models meet these criteria in varying degrees.
- The ability to accommodate provincial interests would be different under each model but it is not immediately clear which model would work best.
- The potential for serving the noncharitable voluntary sector is probably greater in models B and C. The agency in model B would perhaps have the greatest freedom to build partnerships and nurture the sector. The model C Commission would likely have the greatest independence from both the government and the sector and might therefore be able to integrate the compliance and nurturing functions most completely.

While the Regulatory Table did not seek a full consensus on a preferred model, there was widespread support among voluntary sector members of the Table for moving regulatory oversight out of CCRA. The Table saw greater merit in having integrated oversight rather than bifurcated responsibilities. The nurturing role that an agency could play, and the opportunities it could offer to enter into partnerships with other stakeholders, was seen as attractive. On balance, voluntary sector members of the Table favoured Model C, while government members tended to conclude that any model could work.

The Table did not pursue extensively the question of regulation of noncharities. The Table believes, however, that under any model, the oversight of "deemed charities" should be identical to, and integrated with, that of registered charities.

Several other issues concerning change to the institutional framework could be further explored. These issues include regulation of the wide spectrum of not-for-profit organizations discussed previously and governance issues such as the appointment and composition of a new oversight or advisory body.

Appendix B
Two Statutory Board Models From Federal Legislation

1. Standards Council of Canada

COUNCIL ESTABLISHED

3. A corporation is hereby established, to be known as the Standards Council of Canada, consisting of the following members:

(a) a person employed in the public service of Canada to represent the Government of Canada;

(b) the Chairperson and Vice-Chairperson of the Provincial-Territorial Advisory Committee established under subsection 20(1);

(c) the Chairperson of the Standards Development Organizations Advisory Committee established under subsection 21(1); and

(d) not more than eleven other persons to represent the private sector, including non-governmental organizations.

Appointment of members of Council

6. (1) Each member of the Council, other than the persons referred to in paragraphs 3(b) and (c), shall be appointed by the Governor in Council, on the recommendation of the Minister, to hold office during pleasure for such term not exceeding three years as will ensure, as far as possible, the expiration in any one year of the terms of office of not more than one half of the members.

Requirements

(2) The members of the Council referred to in paragraph 3(d) must be representative of a broad spectrum of interests in the private sector and have the knowledge or experience necessary to assist the Council in the fulfilment of its mandate.

No right to vote

(3) The member of the Council referred to in paragraph 3(c) is a non-voting member of the Council.

R.S., 1985, c. S-16, s. 6; R.S., 1985, c. 1 (4th Supp.), s. 33; 1996, c. 24, s.5.

Designation of Chairperson and Vice-Chairperson

7. (1) A Chairperson of the Council and a Vice-Chairperson of the Council shall each be designated by the Governor in Council from among the members of the Council to hold office during pleasure for such term as the Governor in Council considers appropriate.

2. Cultural Property Export and Import Act

Review Board established

18. (1) There is hereby established a board to be known as the Canadian Cultural Property Export Review Board, consisting of a Chairperson and not more than nine other members appointed by the Governor in Council on the recommendation of the Minister.

Members

(2) The Chairperson and one other member shall be chosen generally from among residents of Canada, and

up to four other members shall be chosen from among residents of Canada who are or have been officers, members or employees of art galleries, museums, archives, libraries or other similar institutions in Canada; and

up to four other members shall be chosen from among residents of Canada who are or have been dealers in or collectors of art, antiques or other objects that form part of the national heritage.

Acting Chairperson

(3) The Review Board may authorize one of its members to act as Chairperson in the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant.

Quorum

(4) Three members, at least one of whom is a person described in paragraph(2)(a) and one of whom is a person described in paragraph (2)(b), constitute a quorum of the Review Board.

R.S., 1985, c. C-51, s. 18; 1995, c. 29, ss. 21, 22(E).

Remuneration
19. (1) Each member of the Review Board who is not an employee of, or an employee of an agent of, Her Majesty in right of Canada or a province shall be paid such salary or other amount by way of remuneration as may be fixed by the Governor in Council.

Expenses
(2) Each member of the Review Board is entitled, within such limits as may be established by the Treasury Board, to be paid reasonable travel and living expenses incurred while absent from his ordinary place of residence in connection with the work of the Review Board.

Appendix C
The Cultural Property Review Board: Potential Precedent and Model

One of the generalized concerns which we have heard voiced over the past year or so when there has been a discussion of the possible implementation of a "charity commission" in Canada has been the issue of power over tax-related matters. Simply put, the question is whether an arm's length body should make decisions which have a cost to the federal government in terms of reduced tax revenues?

It is worth keeping in mind that such a model already exists and that over the past 20 or more years, the government has not only not restricted its powers but has actually enhanced them, incorporating those powers within the *Income Tax Act.*

The Cultural Property Review Board, created under the *Cultural Property Import and Export Act* has extensive powers which can affect tax revenues of the federal and provincial governments.

The Board has the following powers:

- It can certify objects to be "cultural property" for *Income Tax Act* (and export) purposes.
- Cultural property which is donated or sold to a "designated institution" escapes capital gains tax completely.
- Gifted cultural property can reduce tax liability of a donor for up to 100 per cent of annual income with a five-year carry forward of the excess.
- The Board can designate institutions which are eligible to receive such property.
- The Board certifies the value of such property and the assigned value is "deemed" to be fair market value under the *Income Tax Act*, and binding upon the donor and Revenue Canada (CCRA), though the donor has an appeal right. (This is a newish power given to the Board five or six years ago.) Revenue Canada (CCRA) can, however, challenge other aspects of the donation, such as whether it is a gift of capital property.
- The Board has funds available which it can give to an institution to allow it to purchase objects which are certified.

Aside and apart from certain extremely vague statutory guides, the Board sets its own rules with regard to determining what is cultural property and which institutions will be designated.

While the Board is appointed by the government, its nine members need not be (and usually do not include) government representatives. Rather, four are drawn from the institutional community (museums and galleries) while four come from the private sector – collectors,

appraisers and dealers – as is required by statute. The Board has been, for the most part, free of political appointees and is well respected by all sectors.

The Board has worked closely with Revenue Canada (CCRA) on certain problems (such as "art flips") and has created some rules to help the Department, while at the same time operating essentially at arm's length.

All costs, including administrative costs, remuneration for Board members and staff (who are public servants), support services and expenses are borne by the government. The Board issues an annual report which is a public document describing its work and discussing some of its more significant decisions. The Board has specific powers to hire experts and appraisers and the government underwrites the cost.

The point here is twofold:

First, the Board in effect "costs" the federal government tens of millions of dollars a year by certifying property for *Income Tax Act* purposes. This cost, of course, is in forgone tax revenue. It operates completely outside other government constraints including budgetary constraints based on deficit fighting. There is no limit on the number of objects the Board may certify in any given year.

Second, the Board is reflective of the two communities which are most interested in its work – the institutional community which will get gifts and make purchases of cultural property and the collectors and gallery owners who usually have title to such items. Only once in its 25-year history has the Chair been a civil servant by profession and in this case, he had retired after a career which was primarily "culturally" oriented.

Thus, we have a model of an effective arm's length body, funded by the federal government, which has a substantial role in making decisions which are income-tax related. In a broad sense, this would be akin to the role a charity commission might have under at least one of the options which is under consideration.